Inlandboatmen's Union of the Pacific *and* Shaver Transportation Company, Bay Area Division and International Organization of Masters, Mates, & Pilots, Pacific Maritime Region. Case 36-CD-170

25 October 1983

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

This is a proceeding pursuant to Section 10(k) of the National Labor Relations Act following a charge filed on 16 July 1982 and an amended charge filed on 4 August 1982 by Shaver Transportation Company, Bay Area Division (Shaver or the Employer), alleging that Inlandboatmen's Union of the Pacific (IBU or Respondent), had violated Section 8(b)(4)(D) of the Act, by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees of the Employer represented by International Organization of Masters, Mates & Pilots, Pacific Maritime Region (MM&P).

Pursuant to notice, a hearing was held before Hearing Officer Richard V. Stratton on 21, 22, 23, 24 and 29 September 1982. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. The Respondent, the Employer, and MM&P filed briefs which have been duly considered.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed. On the entire record in this proceeding, the Board makes the following findings.

I. THE BUSINESS OF THE EMPLOYER

The Employer, an Oregon corporation with its principal place of business in Portland, Oregon, is engaged in the business of providing marine transportation services. The Employer is composed of a parent company (STC) which provides towboat services in the Portland, Oregon, and Vancouver, British Columbia, harbors and on the Columbia and Snake Rivers in Oregon; Shaver Alaska Transportation Co. (SATCO) which provides towboat services in the Prudhoe Bay area in Alaska; and the STC-Bay Area Division which performs ocean and coastline towing in the San Franscico Bay and California coastline areas and is the only division of the Employer involved in the dispute herein. During the past year, a representative period, the Employer realized gross revenues in excess of $6 million and, during this same period, received in excess of $50,000 for services performed for customers outside the State of Oregon. We find, on the basis of the foregoing, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that the MM&P and the IBU are labor organizations within the meaning of Section 2(5) of the Act.

A. *Background and Facts of the Dispute*

In 1976 the STC-Bay Area Division was established by STC in San Francisco for the purpose of performing ocean and coastline towing from that area. At the same time, the Employer signed a 3-year agreement with MM&P[1] for all of its employees on its Bay Area vessels.[2] The Employer's efforts to generate business proved unsuccessful and it discontinued its towing business at some point in 1980. However, in June 1982, the Employer was awarded a 5-year ocean towing contract by the Pennwalt Chemical Corporation. The contract required the Employer to tow the Pennwalt-Totem chemical barge from Portland, Oregon, to the Pacific Ocean, then to various ports in Pittsburgh and Eureka, California, and to Tacoma, Washington,[3] a journey of approximately 20 days. Because of the length of the voyage and the fact that hazardous substances would be towed, the Employer decided to hire employees experienced in ocean towing of hazardous substances who had their able-bodied seamen certificates as required by Coast Guard regulations.[4] The Employer also decided that these employees, unlike those in STC's river operations, would be permanently assigned to this activity thereby allowing the Employer to avoid scheduling problems and to avoid hiring more employees than it needed to perform the contract safely and economically. Pursuant to these requirements, the Employer hired one captain, one mate, two deckhands with able-bodied seamen certificates, one cook, and

[1] From 1973 on, MM&P has represented various employees of the Employer

[2] The parties referred to this type of comprehensive agreement as a "vertical" or "top to bottom" agreement.

[3] The cargo was described as chlorine gas, caustic soda, and other hazardous chemicals.

[4] In ocean towing the barge is attached to the towboat by a cable and towed with the towboat ahead of the barge, whereas in river towing, the barges are pushed in front of and by the towboat.

one engineer.[5] It designated its towboat, the *Shaver*, as the boat to be used to tow the Pennwalt-Totem barge.

Towing of the Pennwalt-Totem barge was scheduled to begin 15 July 1982. On 13 July MM&P obtained authorization cards from all six of the *Shaver's* crewmembers. MM&P made a demand for recognition and bargaining from the Employer, who, based on a check of the authorization cards, recognized MM&P as the collective-bargaining representative of its employees on the *Shaver*. The parties subsequently entered into a vertical agreement effective from 13 July 1982 until 30 May 1984. The parties also specifically agreed that the contract would not apply in those areas where the STC operated under the Columbia River Towboat Agreement, which involved the Respondent and the MM&P.

On 9 July, prior to the Employer's granting of recognition to MM&P, the Respondent contacted the Employer and demanded the work in dispute for its members, contending that its 1969 Northwest Towboat Compliance Agreement (NWTCA) with STC gave it exclusive jurisdictional rights. The Employer did not respond and, on 15 July in a letter to the Employer, the Respondent again demanded the work in dispute and stated, inter alia, that, if the Employer failed to reassign the work, it would consider it an unfair labor practice and would file charges against the Employer and would take other "direct economic action in support of its charges."[6] The following day, 16 July, the Respondent commenced picketing the Employer's Portland facilities; using a boat the Respondent picketed the Employer's moorage and followed the Employer's tugs moving in and about the Portland harbor. The Respondent's picketing efforts continued until it was enjoined on 5 August by the U.S. District Court for the District of Oregon, pursuant to the Regional Director's petition under Section 10(l) of the Act, pending the instant proceedings.[7]

B. *The Work in Dispute*

The parties stipulated that the work in dispute is "the unlicensed crew on ocean and coastal towing work," and involves the classifications of deckhand, engineer, and cook who man the Employer's tug, *Shaver*, when it is engaged in ocean and coastal towing of the chemical barge Pennwalt-Totem for the Pennwalt Corporation.

C. *Contentions of the Parties*

The Employer contends that the disputed work should be assigned to its own employees who are represented by the MM&P. The Employer also asserts that such an assignment is in accord with its past practice as evidenced by its successive collective-bargaining agreements with MM&P from 1973 to the present. Moreover, the Employer contends that factors of safety, skill, efficiency, and economy favor assignment to its employees performing the disputed work and that the Board should therefore find that it properly awarded the work to its MM&P-represented employees.

The Respondent contends that the disputed work should be assigned to its members because the 1969 NWTCA with the Employer is still effective and gives jurisdiction to it. Furthermore, the Respondent contends that historically it has performed the work in dispute as demonstrated by STC's practice of utilizing its members for its past ocean and coastline voyages, and its picketing activity concerns the issue of preservation of work and does not come within the intended proscription of Section 8(b)(4)(D). Moreover, the Respondent asserts that the Employer's assignment has meant a decrease in the job opportunities available for its Columbia River members.

MM&P contends that the disputed work should be assigned to the employees it represents and emphasizes the fact that, because of inaction by both the Respondent and it, the parties effectively abandoned the 1969 NWTCA as neither Union complied with the necessary procedures to renew it. Therefore, the NWTCA cannot now serve as a basis for the Respondent's claim. Moreover, MM&P asserts that the Respondent has waived its right to an exclusive claim to the work in dispute by its failure to protest MM&P's representation (since 1973) of employees employed in the classifications now in dispute. Furthermore, MM&P contends that there was no evidence put forward by the Respondent showing that it had lost any jobs or suffered a decrease in the amount of Columbia River work available for its members as a result of the Employer's current assignment.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon

[5] Of this crew, one was nonunion, two were members of the Respondent, and three were members of MM&P.

[6] The Respondent filed unfair labor practice charges in Case 36-CA-4192 alleging violation of Sec. 8(a)(2) and (3) of the Act. The Regional Director for Region 19 dismissed the charges. The Respondent appealed the dismissal to the General Counsel who, on 15 September 1982, denied the appeal and affirmed the Regional Director's dismissal.

[7] *NLRB v. Inlandboatmen's Union of the Pacific*, No. 82-1023 (D. Or., Aug. 16, 1982) (order granting temporary injunction).

a method for the voluntary adjustment of the dispute.

The record clearly shows that commencing 9 July 1982 the Respondent demanded that the work in question be assigned to its members, and then continued its demand, in a letter to the Employer dated 13 July, which stated, inter alia, that, if the assignment were not made to its members, it would resort to "direct economic action" including picketing the Employer. Subsequently, on 16 July the Respondent began picketing the Employer's facilities and distributed handbills to the public and other area labor unions which stated, inter alia, that the Respondent was picketing because of the Employer's assignment of the work in dispute to employees other than its members, and that the Employer could remedy the situation by recognizing the 1969 NWTCA, and "immediately put[ing] Shaver IBU employees onto the tug Shaver."

Inasmuch as the Respondent picketed the Employer with an object of forcing the Employer to reassign the disputed work to its members, we find that there exists reasonable cause to believe that the Respondent violated Section 8(b)(4)(D) of the Act. As there is no contention that an agreed-upon method for the voluntary adjustment of the dispute exists, we find that the dispute is properly before the Board for a determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[8] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience reached by balancing those factors involved in a particular case.[9]

The following factors are relevant in making the determination of the dispute before us.

1. Board certifications, collective-bargaining agreements, and acquiescence

There are no orders or certifications of the Board awarding jurisdiction of the work in dispute to employees represented by either of the Unions involved in the present procedure.

The Employer and MM&P witnesses have testified that the current vertical agreement between them covers the work in dispute; that it was entered into by the parties on 13 July 1982, and that it is effective until 30 May 1984. However, the Respondent contends that its 1969 NWTCA takes precedence over the Employer's agreement with MM&P because the NWTA is still valid having automatically renewed itself from year to year, and that the Employer has consistently complied with its terms. The renewal provision of the NWTCA provides:

> This agreement is effective [until] December 31, 1969 and shall continue thereafter from year to year unless either party shall deliver to the other party at least sixty (60) days prior to the anniversary of the above termination a written notice of termination.
>
> Both parties further agree that if the Northwest Towboat Association Agreement is modified, then the union shall notify the company in writing of the modifications; and if the company does not notify the union in writing within thirty (30) days thereafter of its rejection, then the company hereby adopts, approves and acknowledges responsibility for the modified agreements.
>
> If the company rejects the modifications in writing within thirty (30) days, then this agreement shall be deemed cancelled at the end of the thirty (30) days.

Record testimony reveals that the NWTCA was modified and renegotiated at least five times since 1969 with none of the required notices provided to the Employer by the Respondent. We specifically note the testimony of the Respondent's former president, Adlum, that the Employer was not notified of any of the changes because the Employer was not performing ocean or coastal towing during the various times the NWTCA was renegotiated or modified. In addition, Adlum testified that in 1969 it was not the Respondent's intention that the NWTCA be self-perpetuating or that it apply to all future towing operations of the Employer. Moreover, the NWTCA was a joint agreement involving the Respondent, MM&P, and the Employer, and both the Employer and MM&P have disavowed its validity. Furthermore, the record shows that, although the Respondent made a verbal protest in 1973 regarding MM&P's contract with the Employer covering employees performing similar work, and in 1976 attempted to assert jurisdiction over similar work by claiming a contractual right by virtue of the Columbia River Towboat Agreement, the Respondent has done nothing affirmative over the years to perfect its claim to the work in dispute. Therefore, we find that the 1969 NWTCA relied on by the Respondent ceased to exist on 31 December 1969 because of the lack of required

[8] *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting System)*, 364 U.S. 9573 (1961).

[9] *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

notice to the Employer of subsequent negotiations and modifications necessary to make the automatic renewal clause operative and because it also was the understanding of the parties that this agreement had expired on that date.[10] We also find that the Respondent, by not taking steps to perfect its claim to the work in dispute since 1973, effectively waived any objections to MM&P's 9-year history of representation of the disputed classifications and that this history overrides any possible application of the 1969 NWTCA.[11] In these circumstances, we find that the factors of collective-bargaining agreements and acquiescence favors an award of the work in dispute to the MM&P-represented employees of the Employer.

2. Area and past practice

The record establishes that historically members of MM&P have performed the work in dispute for the Employer and other San Francisco Bay area towing companies. Moreover, MM&P's undisputed testimony shows that it has comprehensive agreements with approximately 35 employers in the San Francisco Bay area representing several hundred employees, including a significant number of employees who perform the same type of work as that in dispute. The record also shows that the Respondent, under the auspices of the NWTCA, has represented employees performing the same type of work as the work in dispute, but that such work primarily originated from the Puget Sound area of Washington State or, if performed with Columbia River employees, was infrequent and of short duration. Moreover, the record shows that a few of the Employer's previous ocean and coastal towing trips were performed without benefit of a collective-bargaining agreement or union representation. Therefore, we find that there is insufficient evidence to show that the Employer's past practice favors an award of the work in dispute to Respondent. However, we do find that the factor of area and past practice as it pertains to the San Francisco Bay area favors an award to the Employer's MM&P-represented employees.

3. Economy and efficiency of operation

The Employer testified that it won the Pennwalt contract because of its low bid which was based, in part, on using a crew of six employees. Furthermore, if assignment of the work were made to employees represented by the Respondent, the Employer would be required to hire two additional crewmembers who would have little, if any, work to do and it would substantially affect its profit-and-loss margin on this contract. Additionally, because the crew on the *Shaver* is out to sea for long periods of time, the Employer asserts that it is more efficient and economical to have a permanent crew for this activity because it avoids scheduling problems and significantly reduces the potential for conflict between its other operations. In these circumstances, we find that the factors of economy and efficiency favor an assignment of the disputed work to the Employer's MM&P-represented employees.

4. Skills and safety

The Employer testified that because its ocean work involves the towing of a chemical barge transporting liquid chlorine, caustic soda, and other hazardous substances, the deckhand duties are different from those performed on a river or in a harbor because they are required to handle heavier lines, winches, and other equipment not used in river towing. Deckhands are required to watch over the tow lines when the tow is crossing a bar into a harbor and to perform other special duties whenever the tow encounters bad weather or heavy seas.[12] In addition, the record shows that these deckhands are required to know special procedures regarding hooking up chemical barges to towboats and securing them to various docks and what safety procedures must be performed in the event of a mishap.

Although there was testimony indicating that some of the employees represented by the Respondent possess the skills necessary to perform the disputed work, the evidence shows that the employees currently performing the work have had greater training and experience enabling them to perform the various functions safely, efficiently, and at a higher skill level than theRespondent's members. The Employer credibly testified that it reviewed the Respondent's out-of-work listing and none of the employees listed was qualified. Therefore, we find that the factors of skill and safety favor an award to employees represented by MM&P.

5. Employer preference

The Employer hired new experienced employees to perform the disputed work for the sole purpose of performing the Pennwalt towing job safely, efficiently, and economically. The record clearly

[10] *Longshoremen Local 54 (Hugo Neu & Sons)*, 248 NLRB 775 (1980). We also find that, even if the NWTCA were valid, it still would not be relevant because it covers a type of work different from that in dispute herein.

[11] *Longshoremen Local 1410 (Mobile Steamship Assn.)*, 237 NLRB 1283 (1978).

[12] A "bar" is described as that area of the ocean where the inland waterway and the ocean meet.

shows that the Employer prefers that the work be awarded to these employees and that the Employer is satisfied with their job performance. Accordingly, factor favors an award to the Employer's MM&P-represented employees.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors we conclude that the employees who are represented by MM&P rather than the employees represented by the Respondent, are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's preference, collective-bargaining agreements, acquiescence, area practice, economy and efficiency, and skills and safety factors involved in performing the work. Accordingly, we shall determine the dispute before us by awarding the work in dispute to those employees represented by MM&P, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board hereby makes the following Determination of Dispute.

1. Employees of Shaver Transportation Company, Bay Area Division, who are represented by International Organization of Masters, Mates & Pilots, Pacific Maritime Region, are entitled to perform the work of engineer, deckhand, and cook on the Employer's tug *Shaver* while it is engaged in ocean and coastal towing work.

2. Inlandboatmen's Union of the Pacific is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Shaver Transportation Company, Bay Area Division, to assign the above work to employees represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, Inlandboatmen's Union of the Pacific shall notify the Regional Director for Region 19 whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.